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NOTES

“CONDITIONAL” RES IPSA LOQUITUR IN ILLINOIS MEDICAL MALPRACTICE LAW: PROOF OF A RARE OCCURRENCE AS A BASIS FOR LIABILITY— *SPIDLE V. STEWARD*

The traditional medical negligence formula¹ presents inherent difficulties for an injured litigant who allegedly has received negligent medical treatment. The difficulties a litigant faces in sustaining his or her burdens of proof² usually arise from the inability of juries and courts to comprehend the

1. The essential elements to be proven by a plaintiff to establish a medical malpractice case in Illinois are: (1) that the defendant physician owed the patient a duty, (2) that the defendant physician breached that duty, (3) that the defendant physician's breach of that duty was the proximate cause of the plaintiff's injuries, and (4) damages. *Borowski v. Von Solbrig*, 14 Ill. App. 3d 672, 677, 303 N.E.2d 146, 150 (1st Dist. 1973), *aff'd*, 60 Ill. 2d 418, 328 N.E.2d 301 (1975). Traditionally, a plaintiff was also required to plead and prove freedom from contributory negligence, *id.*; however, since the plaintiff was frequently anesthetized and under the complete control of the treating physician, freedom from contributory negligence was often found as a matter of law. *See, e.g., Peters v. Howard*, 206 Ill. App. 610, 619 (3d Dist. 1917) (unconscious plaintiff held to be in no condition to exercise any control over herself; thus, freedom from contributory negligence found as a matter of law). A plaintiff no longer needs to plead and prove freedom from contributory negligence since the Illinois Supreme Court adopted a system of comparative negligence in *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

The medical negligence formula is merely a variation of the traditional negligence formula tailored to correspond to the medical profession's higher standard of care owed to patients. A physician owes the patient a duty to possess the skill and knowledge of a physician in good standing in the same or similar community in the same or similar circumstances. *See Ritchey v. West*, 23 Ill. 329, 330 (1860) (physician must possess and exercise degree of skill and care which is ordinarily possessed by members of the profession); *Taber v. Riordan*, 83 Ill. App. 3d 900, 904, 403 N.E.2d 1349, 1353 (2d Dist. 1980) (physician-patient relationship is of a fiduciary nature); *Northern Trust Co. v. Skokie Valley Community Hosp.*, 81 Ill. App. 3d 1110, 1126-27, 401 N.E.2d 1246, 1259 (1st Dist. 1980) (duty owed is not one of "best possible care"). *See also ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL)* §§ 105.00-.01 (2d ed. 1971). Unless the breach of duty complained of is a matter of common knowledge, the standard of care, and the deviation from it, must be established by expert testimony. *Walski v. Tiesenga*, 72 Ill. 2d 249, 256, 381 N.E.2d 279, 282 (1978); *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 423, 328 N.E.2d 301, 304-05 (1975). *See also Spidle v. Steward*, 79 Ill. 2d 1, 13-14, 402 N.E.2d 216, 221-22 (1980). *See generally Morris, The Role of Expert Testimony in the Trial of Negligence Issues*, 26 Tex. L. Rev. 1 (1947).

2. Within the concept of "burdens of proof" dwells two separate and distinct obligations of a plaintiff in a negligence action. Initially, the plaintiff has the responsibility to go forward with evidence of a sufficient quantity to establish a prima facie case. 9 J. WIGMORE, EVIDENCE § 2487, at 279 (3d ed. 1940) [hereinafter cited as WIGMORE]. This is a duty owed the trial judge and is often referred to as the burden of production. E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 301.4, at 55-57 (3d ed. 1979). If this burden is not satisfied, the issue of negligence will not go to the trier of fact and the plaintiff will face a directed verdict. *Id.* If, however, the plaintiff succeeds in satisfying the burden of production, he or she is then faced with the burden

esoteric nature of medical science and from the difficulty of retaining expert witnesses to establish both an accepted standard of care and a deviation from that standard.³ The Illinois Supreme Court only recently acknowledged the problems of proof traditionally encountered by medical malpractice litigants, and extended the doctrine of *res ipsa loquitur*⁴ to apply to medical malpractice actions.⁵

The doctrine of *res ipsa loquitur* permits the trier of fact to draw an inference of negligence from circumstantial evidence of the events surrounding an injury.⁶ For a plaintiff to rely upon the doctrine of *res ipsa loquitur*,

of persuasion. The burden of persuasion has been stated as whether the plaintiff has been successful in convincing the trier of fact that the defendant's conduct was negligent. C. McCORMICK, EVIDENCE § 336, at 783-84 (2d ed. E. Cleary 1972); 9 WIGMORE, *supra*, § 2485, at 271-74.

Although the burden of production alternates between litigants on specific issues, the burden of persuasion does not shift once it has been allocated by the trial judge. C. McCORMICK, *supra*, § 337, at 788; 9 WIGMORE, *supra*, § 2489, at 285. For a thorough discussion of the factors that influence judicial allocation of the burdens of proof, see Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

3. See notes 20-22 and accompanying text *infra*.

4. The literal translation of the Latin phrase is "[t]he thing speaks for itself." BLACK'S LAW DICTIONARY 1173 (5th ed. 1979). For an interesting discussion of the origin and development of *res ipsa loquitur* from ancient Rome to the modern era, see Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936) [hereinafter cited as Prosser, *Procedural Effect*]. See also notes 6-11 and accompanying text *infra*.

5. *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill. 2d 298, 305, 312 N.E.2d 259, 262 (1974). See notes 17-37 and accompanying text *infra*. See generally Podell, *Application of Res Ipsa Loquitur in Medical Malpractice Litigation*, 44 INS. COUNSEL J. 634 (1977).

6. *Spidle v. Steward*, 79 Ill. 2d 1, 5, 402 N.E.2d 216, 218 (1980).

The doctrine is not a separate theory of recovery; rather, it is merely a form of circumstantial evidence that assists plaintiffs in fulfilling their burden of production, thereby avoiding a directed verdict. 3 J. DOOLEY, MODERN TORT LAW § 48.03, at 328 (1977 & Supp. 1979) [hereinafter cited as DOOLEY]; 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 19.11, at 1099 (1956 & Supp. 1968) [hereinafter cited as HARPER & JAMES]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 40, at 229 (4th ed. 1971) [hereinafter cited as PROSSER]. The doctrine is only relevant to the nature of the plaintiff's proof and does not affect the "necessity or manner of proof" of proximate cause. *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill. 2d 298, 304, 312 N.E.2d 259, 262 (1974); *McLaughlin v. Rush-Presbyterian St. Luke's Medical Center*, 68 Ill. App. 3d 546, 550-51, 386 N.E.2d 334, 338 (1st Dist. 1979).

The procedural effect given to the doctrine in most jurisdictions is that of a permissive inference. 2 HARPER & JAMES, *supra*, § 19.11, at 1100-01; PROSSER, *supra*, § 40, at 228-29. In *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 207 N.E.2d 305 (1965), the Illinois Supreme Court followed this theory, stating:

[W]hile there appears to be conflict in Illinois decisions as to whether the presumption or inference of negligence raised by the doctrines of *res ipsa loquitur* vanishes entirely when any evidence appears to the contrary, the more recent, the more studied, and the more just view is that the inference, or presumption, does not simply vanish or disappear when contrary evidence appears, but remains to be considered with all the other evidence in the case and must be weighed by the jury against the direct evidence offered by the party charged.

Id. at 449, 207 N.E.2d at 307. The *Metz* court also held that the doctrine places on the defendant a "duty to come forward and make explanation." *Id.* at 451, 207 N.E.2d at 308. *Accord*, *Sweeney v. Erving*, 228 U.S. 233, 240 (1913).

he or she must establish three elements:⁷ (1) the injury is one that would not normally occur in the ordinary course of events absent negligence (probability element);⁸ (2) the instrumentality or agency that caused the injury must

The doctrine operates to shift the burden of production to the defendant only in the practical sense that if rebuttal evidence is not offered, the jury will most likely find for the plaintiff. Prosser, *Procedural Effect*, *supra* note 4, at 244. See also 3 DOOLEY, *supra*, § 48.16, at 341 (plaintiff not entitled to a directed verdict if no rebuttal evidence is offered; inference of negligence remains for the jury to draw).

Some jurisdictions accord the doctrine the procedural effect of a presumption warranting a directed verdict for the plaintiff if no rebuttal evidence is offered by the defendant. See 2 HARPER & JAMES, *supra*, § 19.11, at 1101. If rebuttal evidence is introduced, the presumption of negligence vanishes. See, e.g., *DeBardeleben v. Tynes*, 290 Ala. 263, 266-67, 276 So. 2d 126, 129 (1973) (presumption of negligence is not evidence nor does it serve in the place of evidence after contrary evidence has been introduced); *Holmes v. Birmingham Transit Co.*, 270 Ala. 215, 223, 116 So. 2d 912, 919 (1959) (uncontroverted rebuttal evidence discharges the presumption of negligence).

One state, Colorado, treats the doctrine not only as creating a presumption of negligence, but also as shifting the ultimate burden of persuasion to the defendant. *Weiss v. Axler*, 137 Colo. 544, 559, 328 P.2d 88, 96-97 (1958) (presumption of negligence exists until the defendant satisfies trier of fact, by a preponderance of the evidence, that he was not negligent); *Barnes v. Frank*, 28 Colo. App. 389, 391-92, 472 P.2d 745, 746 (1970) (conclusive presumption of negligence unless the defendant satisfies trier of fact that he was not negligent). For arguments advocating the shift of the burden of persuasion in accident cases, see 1 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶¶ 15.03-.07 (1977 & Supp. 1980) (particularly when professional malpractice is alleged) [hereinafter cited as LOUISELL & WILLIAMS] and Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519, 529-35 (1934).

Professor James has argued that the controversy over the competing theories is a "tempest [that] seems to be one in a teapot" since the plaintiff usually prevails in these cases and the procedural effect granted the doctrine is of little significance. James, *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 VA. L. REV. 179, 225 (1951) [hereinafter cited as James, *Proof of the Breach*].

7. 2 HARPER & JAMES, *supra* note 6, § 19.5, at 1081; PROSSER, *supra* note 6, § 39, at 213-14; 9 WIGMORE, *supra* note 2, § 2509, at 380-82.

The most frequently cited enunciation of the elements of *res ipsa loquitur* was made in *Scott v. London & St. Katherine Docks Co.*, 196 Eng. Rep. 665 (1865). As Chief Justice Erle stated:

There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Id. at 667.

For a criticism of the traditional doctrine of *res ipsa loquitur* in terms of its inherent logical inconsistency, and an argument for a new formulation of the doctrine based on a mathematical probability model, see Comment, *Mathematics, Fuzzy Negligence, and the Logic of Res Ipsa Loquitur*, 75 NW. U.L. REV. 147 (1980).

8. *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 449, 207 N.E.2d 305, 307 (1965). Dean Prosser stated that the probability element is established by

evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Where no such balance of probabilities in favor of negligence can reasonably be found, *res ipsa loquitur* does not apply.

PROSSER, *supra* note 6, § 39, at 218. See also notes 77-80 and accompanying text *infra*.

have been in the control or management of the defendant (control element);⁹ and, (3) the injury must not have been due to any voluntary action by plaintiff (contributory negligence element).¹⁰ When the trial judge determines that the plaintiff has satisfied the burden of production on these elements, the plaintiff has avoided a directed verdict and the issue of negligence is submitted to the jury.¹¹

In *Spidle v. Steward*,¹² the Illinois Supreme Court liberalized the application of *res ipsa loquitur* in medical malpractice actions by implicitly adopting a conditional form of the doctrine.¹³ The *Spidle* court held that expert

9. *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 448-49, 207 N.E.2d 305, 307 (1965). Originally, in order to establish the control element, a plaintiff needed to prove that the defendant was in "exclusive" control of the instrumentality that caused the injury. *See, e.g.*, *Bjornson v. Saccone*, 88 Ill. App. 6, 11 (1st Dist. 1899). The exclusivity requirement of the control element, however, has proven to be too restrictive in practice. *See, e.g.*, *Duncan v. Queen of Angels Hosp.*, 11 Cal. App. 3d 665, 668-70, 90 Cal. Rptr. 157, 158-60 (1970) (elderly patient struck by hospital cart; *res ipsa loquitur* inapplicable because plaintiff was in control of her actions as a pedestrian, therefore, requisite exclusive control in defendant did not exist). Therefore, courts have been compelled to allow the use of the doctrine even though the instrumentality that caused the injury was not in the defendant's exclusive control at the time of the injury. All that need be proven is that there is no rational ground from which to impute negligence to anyone but the defendant. *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 450, 207 N.E.2d 305, 307 (1965) (defendant utility company held to be in management and control of gas lines at time of leakage because it had the non-delegable responsibility to maintain the lines); *Martino v. Barra*, 10 Ill. App. 3d 97, 103, 293 N.E.2d 745, 749 (1st Dist. 1973) (defendant tire service corporation repaired tire 15 days prior to an accident caused by that defective tire; *res ipsa loquitur* applicable as there was no evidence to impute negligence to any other party). *Accord*, *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). *Cf.* *Ostendorf v. Brewer*, 51 Ill. App. 3d 1009, 1012, 367 N.E.2d 214, 216 (4th Dist. 1977) (*res ipsa loquitur* inapplicable because it was reasonable to impute negligence to the plaintiff as he had actual physical control over the defective tractor for 11 hours before the injury). *See generally* 2 HARPER & JAMES, *supra* note 6, § 19.7, at 1085-92; PROSSER, *supra* note 6, § 39, at 218-21.

10. *Drewick v. Interstate Terminals, Inc.*, 42 Ill. 2d 345, 348, 247 N.E.2d 877, 879 (1969); *McLaughlin v. Rush-Presbyterian St. Luke's Medical Center*, 68 Ill. App. 3d 546, 550, 386 N.E.2d 334, 338 (1st Dist. 1979). *See* note 1 *supra*.

11. The applicability of *res ipsa loquitur* is a question of law for the trial court to decide. *Drewick v. Interstate Terminals, Inc.*, 42 Ill. 2d 345, 349, 247 N.E.2d 877, 879 (1969); *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 449, 207 N.E.2d 305, 307 (1965). The duty of the trial judge at this stage of the litigation is to decide whether the plaintiff produced sufficient evidence from which the jury could draw a reasonable inference of negligence. *See Spidle v. Steward*, 79 Ill. 2d 1, 7, 402 N.E.2d 216, 218 (1980); 9 WIGMORE, *supra* note 2, §§ 2494-95, at 293-313. *See also* notes 77-96 and accompanying text *infra*. If the trial judge determines that this burden of production has been fulfilled, it is then for the trier of fact to weigh the evidence to determine if the defendant's proof has overcome the circumstantial evidence of negligence. If not, the trier of fact may reasonably draw the inference that the defendant's conduct was negligent. *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 449-50, 207 N.E.2d 305, 307 (1965); *Erckman v. Northern Ill. Gas Co.*, 61 Ill. App. 2d 137, 146, 210 N.E.2d 42, 46 (2d Dist. 1965). *See generally* James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949) [hereinafter cited as James, *Judge and Jury*]; Prosser, *Procedural Effect*, *supra* note 4, at 267.

12. 79 Ill. 2d 1, 402 N.E.2d 216 (1980).

13. *See* notes 97-119 and accompanying text *infra*.

testimony establishing the occurrence of a rare and unusual result of treatment, when coupled with certain specific acts of negligence, was sufficient to require submission of the probability element to the jury.¹⁴ The ultimate inference of negligence, therefore, is conditional upon the jury finding that the plaintiff's expert witness believed that the plaintiff's disorder probably had negligent antecedents.¹⁵ The significance of this conditional formulation of *res ipsa loquitur* lies in the lesser amount of evidence required for submission of the cause to the jury.¹⁶

The *Spidle* decision allows for a more liberal application of *res ipsa loquitur* than has been previously recognized in any jurisdiction. The effect of such a liberal application of the doctrine is to invite the jury to speculate as to the causes of injuries resulting from procedures that are not within its common knowledge. In light of precedent as well as the potential procedural and societal ramifications of the decision, *Spidle* evidences an ill-advised manipulation of a legal principle to reach a desired conclusion.

DEVELOPMENT OF RES IPSA LOQUITUR IN ILLINOIS MEDICAL MALPRACTICE LITIGATION

Traditionally, courts have been reluctant to apply the doctrine of *res ipsa loquitur* in medical malpractice actions.¹⁷ The rationale has been that because medical procedures were not considered a matter of common knowledge, a lay jury could only speculate as to the probabilities of negligence.¹⁸ Gradually, Illinois appellate courts began to realize that in certain types of medical accidents a jury could draw a reasonable inference of negligence based on the common knowledge and past experiences of the community.¹⁹

14. 79 Ill. 2d at 13, 402 N.E.2d at 221.

15. *Id.* at 9-10, 402 N.E.2d at 219-20.

16. See notes 97-105 and accompanying text *infra*.

17. See *Olander v. Johnson*, 258 Ill. App. 89, 96 (2d Dist. 1930) (sponge left in abdomen following surgery; *res ipsa loquitur* inapplicable); *Graiziger v. Henssler*, 229 Ill. App. 365, 374 (1st Dist. 1923) (burn from electric heat treatment; *res ipsa loquitur* inapplicable); *Goodman v. Bigler*, 133 Ill. App. 301, 303 (4th Dist. 1907) (improper healing of fractured limb; *res ipsa loquitur* inapplicable). *Accord*, *Ewing v. Goode*, 78 F. 442, 443 (C.C.S.D. Ohio 1897) (dictum) (*res ipsa loquitur* would result in physicians being held liable for bad results of treatment).

18. *Cf. Burrow v. Widder*, 52 Ill. App. 3d 1017, 1023, 368 N.E.2d 443, 447 (1st Dist. 1977) (jury may not speculate as to proper standard of care; standard of care must be established by expert testimony); *Sims v. Parker*, 41 Ill. App. 284, 286 (1st Dist. 1891) (impropriety of treatment must be shown by the expert evidence; jury cannot draw conclusions based solely on the result of treatment).

The belief that medical procedures are not a matter of common knowledge is embodied in the Illinois civil pattern jury instruction concerning the duty of a medical practitioners. ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) § 105.01 (2d ed. 1971). The jury instruction states that a juror "must not attempt to determine [the breach of duty] from any personal knowledge [he or she may] have." *Id.* See Note, *Malpractice and Medical Testimony*, 77 HARV. L. REV. 333, 335 (1963) [hereinafter cited as *Medical Testimony*]; Comment, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, 60 NW. U.L. REV. 852, 857 (1966) [hereinafter cited as *Application*].

19. See *Estell v. Barringer*, 3 Ill. App. 3d 455, 278 N.E.2d 424 (4th Dist. 1972). The *Estell* court stated:

The adoption of this common knowledge exception to the requirement of proof by expert testimony in medical malpractice actions was precipitated by the rigors of proof that injured plaintiffs have traditionally encountered.²⁰ Historically, plaintiffs have had difficulty proving negligence due to an inability to comprehend the complex nature of the medical treatment²¹ and the existence of an alleged "conspiracy of silence" in the medical profession whereby practitioners were reluctant to testify against one another.²² Fur-

To summarize what appears to this court to be the consensus of Illinois case law, the *res ipsa loquitur* doctrine in Illinois is applicable in a medical malpractice case where the conduct of a doctor is so grossly remiss as to fall within the common knowledge of a layman, or is so contrary to acceptable and customary medical practices and standards shown of record, that the results or injuries complained of would not have occurred but for negligence in the performance of such conduct.

Id. at 458, 278 N.E.2d at 428.

Although the facts of each particular case are determinative, *res ipsa loquitur* has been applied in Illinois to actions involving procedures that are within the common knowledge of the jury in two general types of cases. First, the doctrine has been applied in situations where a foreign object was left inside the patient's body during surgery. *See, e.g.*, *McLaughlin v. Rush-Presbyterian St. Luke's Medical Center*, 68 Ill. App. 3d 546, 386 N.E.2d 334 (1st Dist. 1979) (*res ipsa loquitur* applicable when catheter was "lost" in plaintiff's circulatory system); *Hall v. Grosvenor*, 267 Ill. App. 119 (1st Dist. 1932) (sponge left in abdomen following surgery permits an inference of negligence although no mention of *res ipsa loquitur* was made). Second, the common knowledge of the jury has been held sufficient to support an inference of negligence when patients have suffered burns from allegedly negligent heat or x-ray treatment. *See, e.g.*, *Adamsen v. Magnelia*, 280 Ill. App. 418 (2d Dist. 1935) (burns from electric therapeutic heat treatment; *res ipsa loquitur* applicable); *Holcomb v. Magee*, 217 Ill. App. 272 (2d Dist. 1920) (burns received from electric heat treatment machine; *res ipsa loquitur* applicable). *See generally* 2 DOOLEY, *supra* note 6, §§ 34.62-.63; 1 LOUISELL & WILLIAMS, *supra* note 6, ¶ 14.06; *Application*, *supra* note 18, at 858-64.

20. *See generally* 1 LOUISELL & WILLIAMS, *supra* note 6, ¶ 14.03.

21. *See, e.g.*, *Christie v. Callahan*, 124 F.2d 825 (D.C. Cir. 1941). In *Christie*, when ruling on the applicability of *res ipsa loquitur*, the court noted:

Malpractice is hard to prove. The physician has all of the advantage of position. He is, presumably, an expert. The patient is a layman. The physician knows what is done and what is its significance. The patient may or may not know what is done. He seldom knows its significance. He judges chiefly by results. The physician has the patient in his confidence, disarmed against suspicion.

Id. at 827-28. *See also* *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 568, 317 P.2d 170, 175 (1st Dist. 1957); D. HARNEY, *MEDICAL MALPRACTICE* 173 (1973); Rubsamen, *Res Ipsa Loquitur in California Medical Malpractice Law—Expansion of a Doctrine to the Bursting Point*, 14 STAN L. REV. 251, 253 (1962) [hereinafter cited as Rubsamen].

22. *See* Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

The "conspiracy of silence" among the members of the medical profession has been extensively noted. *See, e.g.*, *Chiero v. Chicago Osteopathic Hosp.*, 74 Ill. App. 3d 166, 176, 392 N.E.2d 203, 211 (1st Dist. 1979); *Sanders v. Frost*, 112 Ill. App. 2d 234, 241, 251 N.E.2d 105, 108 (5th Dist. 1969); Comment, *Medical Malpractice—Expert Testimony*, 60 NW. U. L. REV. 834, 835-37 (1966). The reasons for the "conspiracy" are said to be both psychological and economic. There exists a feeling among physicians that courts of law are not the proper forum for reasoned inquiry into medical causation. Further, there is a general fear that appearing as a plaintiff's expert witness will result in expulsion from medical societies or in cancellation of the willing expert's professional liability insurance. *See generally* 1 LOUISELL & WILLIAMS, *supra* note 6, ¶ 14.03;

ther, the "common knowledge" exception has been justified by arguments that the increased sophistication of lay juries facilitates greater comprehension of medical procedures,²³ and that *res ipsa loquitur* is a means of effectuating an avowed public policy favoring compensation for injured plaintiffs.²⁴

The common knowledge exception to the requirement of proof by expert testimony was recognized by the Illinois Supreme Court in *Edgar County Bank & Trust Co. v. Paris Hospital, Inc.*²⁵ The *Edgar* court held that the administration of intramuscular injections is a commonplace occurrence and thus an "appropriate state of facts" to apply the doctrine of *res ipsa loquitur*.²⁶ The court reasoned that since the effect of *res ipsa loquitur* is only relevant to the method of proof, and does not affect the necessary proof of proximate cause, there were no valid reasons to render the doctrine inapplicable to a medical malpractice action "given the appropriate state of facts."²⁷

The Illinois Supreme Court expanded the utility of *res ipsa loquitur* in medical malpractice actions in *Walker v. Rumer*.²⁸ In *Walker*, the plaintiff

Medical Testimony, *supra* note 18, at 336-38; Comment, *Medical Malpractice—Expert Testimony*, *supra*, at 835-37.

23. See, e.g., *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill. 2d 298, 312 N.E.2d 259 (1974). In *Edgar*, the Illinois Supreme Court rationalized its applications of *res ipsa loquitur* to an action involving the administration of a hypodermic injection as follows:

The administration of intramuscular injections is now so commonplace that it is highly improbable that anyone has not undergone the experience. The procedure is indeed so generally in use that the injections, for the most part, are administered by nurses and other hospital personnel without the supervision or even the presence of a physician.

Id. at 306, 312 N.E.2d at 263. *Accord*, *Corn v. French*, 71 Nev. 280, 296-97, 289 P.2d 173, 181-82 (1955) (negligence could be inferred based on common knowledge of the jury for surgeon's failure to conduct a biopsy prior to a mastectomy).

24. Justice Ryan made note of the public policy favoring compensation for injured plaintiffs in his dissenting opinion in *Spidle*. 79 Ill. 2d at 25-26, 402 N.E.2d at 227 (Ryan, J., dissenting). Justice Ryan argued that a system of no-fault professional liability insurance should be considered. *Id.* See also note 152 *infra*. Professor James has also noted that *res ipsa loquitur* functions as a vehicle to implement public policy. James, *Proof of the Breach*, *supra* note 6, at 198-99. Professor James observed:

In a system where the adoption of an agnostic position will deny recovery to the accident victim (who has the burden of proof) the practical impact and importance of *res ipsa loquitur* has probably consisted in its tendency to invite or encourage the assumption of broad and doubtful postulates favorable to liability in many situations where the courts would otherwise be understandably reluctant to adopt them. . . . If the foregoing is true, the persistence and expansion of the 'doctrine'—in spite of trenchant and penetrating logical criticism—may well be attributable to the strong general trend towards strict liability and social insurance—a trend which is corroding a system of liability nominally based on fault. This would also account for the greater readiness to invoke the doctrine in certain kinds of situations . . . where the accident victim's burden of proof has been particularly forbidding.

Id. (citations omitted). See also 2 HARPER & JAMES, *supra* note 6, § 19.4, at 1069 n.5.

25. 57 Ill. 2d 298, 312 N.E.2d 259 (1974).

26. *Id.* at 305-06, 312 N.E.2d at 262-63.

27. *Id.* at 304-05, 312 N.E.2d at 262.

28. 72 Ill. 2d 495, 381 N.E.2d 689 (1978).

alleged that the defendant doctor had negligently performed a complex surgical procedure known as a bilateral palmar fasciectomy.²⁹ The supreme court held that the application of *res ipsa loquitur* in medical malpractice actions is not limited by the common knowledge exception,³⁰ but is contingent on proof that "the occurrence was such as in the ordinary course of things would not have happened" had the defendant exercised proper care.³¹ Proof of this proposition would satisfy the plaintiff's burden of production as to the probability element and thus permit the jury to draw an inference of negligence.³² The *Walker* court reasoned that the probability of negligence could be established by the common knowledge of the jury or by expert testimony when complex medical procedures were involved.³³ The court reconciled its decision with *Edgar* by holding that the *Edgar* decision did not limit the application of *res ipsa loquitur* to commonplace situations.³⁴ The *Walker* court thus held that the factual situation presented was an "appropriate state of facts" to which *res ipsa loquitur* could be applied.³⁵

Although *Walker* established that *res ipsa loquitur* could apply to actions involving complex medical procedures, the decision was rendered on the pleadings.³⁶ Therefore, the amount and quality of evidence required to prove the probability element of *res ipsa loquitur* in situations involving complex medical procedures was not determined. Such was the status of *res ipsa loquitur* in Illinois medical malpractice law when the Illinois Supreme Court addressed these evidentiary considerations in *Spidle v. Steward*.³⁷

29. *Id.* at 498, 381 N.E.2d at 690.

30. *Id.* at 501, 381 N.E.2d at 691 (quoting RESTATEMENT (SECOND) OF TORTS § 328 D, Comment d (1965)).

31. 72 Ill. 2d at 500, 381 N.E.2d at 691. The Illinois Supreme Court affirmed the appellate court's decision, *Walker v. Rumer*, 51 Ill. App. 3d 1005, 367 N.E.2d 158 (4th Dist. 1977), but disapproved of the appellate court's reasoning. 72 Ill. 2d at 501, 381 N.E.2d at 692.

32. See notes 8 & 11 *supra*.

33. 72 Ill. 2d at 500, 381 N.E.2d at 691. The expansion of *res ipsa loquitur* to situations where expert testimony is required to establish the probabilities of negligence has been heralded as a logical development in medical malpractice law because expert testimony has consistently been allowed in non-malpractice cases to establish the foundation for *res ipsa loquitur*. See *Application*, *supra* note 18, at 865 (citing Fricke, *The Use of Expert Evidence in Res Ipsa Loquitur Cases*, 5 VILL. L. REV. 59 (1959)). See also *Medical Testimony*, *supra* note 18, at 348-49.

34. 72 Ill. 2d at 500-01, 381 N.E.2d at 691.

35. *Id.*

36. *Id.* at 502, 381 N.E.2d at 692.

37. 79 Ill. 2d 1, 402 N.E.2d 216 (1980). The Illinois appellate courts addressed the issue of the sufficiency of expert testimony to invoke *res ipsa loquitur* in medical malpractice actions on two occasions in the interim between *Walker* and *Spidle*. In both instances the plaintiff's evidence was held to be insufficient to warrant a *res ipsa loquitur* instruction.

In *Greenberg v. Michael Reese Hosp.*, 78 Ill. App. 3d 17, 396 N.E.2d 1088 (1st Dist. 1979), the appellate court held that *res ipsa loquitur* was inapplicable because it was not a matter of common knowledge that tumor development subsequent to irradiation treatment would not have occurred absent negligence. *Id.* at 24-25, 396 N.E.2d at 1094. *Res ipsa loquitur* was also held inapplicable in *Chiero v. Chicago Osteopathic Hosp.*, 74 Ill. App. 3d 166, 392 N.E.2d 203 (1st Dist. 1979). In *Chiero*, the plaintiff's expert witness testified that an air embolism was a

THE SPIDLE DECISION

Facts and Procedural History

In August 1971, the defendant, Dr. Lee A. Steward, began treating the plaintiff, Judith Marie Spidle, for severe abdominal pain.³⁸ Dr. Steward's eventual diagnosis was that Judith Spidle was suffering from pelvic inflammatory disease.³⁹ Hospitalized after conservative treatment by medication had failed,⁴⁰ Mrs. Spidle consented to a laparotomy which was performed on August 3, 1972.⁴¹ During the course of that surgery, Dr. Steward decided that the removal of Judith Spidle's diseased fallopian tubes and ovaries was necessary to restrict the spread of the infection.⁴² Approximately one week after the surgery Judith Spidle discovered fecal matter draining from her surgical incision and vagina.⁴³ This complication was later diagnosed as a vaginal fecal fistula.⁴⁴ Judith Spidle's condition persisted for approximately four years despite repeated attempts by several physicians to control the drainage.⁴⁵

"normal happenstance in action" during a transurethral resection. *Id.* at 170, 392 N.E.2d at 207. The appellate court held that since the embolism and resulting cardiac arrest were not injuries from which negligence could be inferred based on common knowledge, *res ipsa loquitur* was inapplicable because the expert testimony established merely that the injury was a "normal happenstance." *Id.* at 175, 392 N.E.2d at 210. The appellate court reasoned that to allow the plaintiff's expert's testimony to establish the foundation for *res ipsa loquitur* would render the defendant liable on mere proof of a bad result. *Id.* at 175-76, 392 N.E.2d at 210. *Accord*, *Siverson v. Weber*, 57 Cal. 2d 834, 372 P.2d 97, 22 Cal. Rptr. 337 (1962).

38. Record at 445, *Spidle v. Steward*, No. 74-L-33 (Cir. Ct. Coles County, Ill. Aug. 15, 1977) [hereinafter cited as Record].

39. *Id.* at 449-50. Expert witnesses at trial defined pelvic inflammatory disease as an infection of the fallopian tubes, ovaries, and uterus. *Id.* at 235-36.

40. *Id.* at 449-77. Dr. Steward's testimony documents the plaintiff's medical history from the time pelvic inflammatory disease was diagnosed until the surgery was performed. *Id.* Conservative treatment of pelvic inflammatory disease with antibiotics is advised when the patient is at an acute stage of the disease because surgery might cause more serious complications. *Id.* at 278, 580-84.

41. A laparotomy is an incision through any part of the abdominal wall. *STEDMAN'S MEDICAL DICTIONARY* 682 (22d ed. 1972). Dr. Steward's testimony revealed that the initial purpose of the surgery was exploratory and the decision to perform the hysterectomy was not made until the body cavity had been entered. Record, *supra* note 38, at 274-77, 280-81, 316-17.

42. Record, *supra* note 38, at 274-77, 280-81, 285. This procedure was called a supracervical hysterectomy. 79 Ill. 2d at 4, 402 N.E.2d at 217. A supracervical hysterectomy is defined as an incomplete removal of the uterus and a complete removal of the fallopian tubes and ovaries. See *STEDMAN'S MEDICAL DICTIONARY* 613 (22d ed. 1972) (also subtotal hysterectomy).

43. Record, *supra* note 38, at 48-49.

44. *Id.* at 99-101. A fistula is an abnormally formed sinus between the surface of the body and an organ. 1 *ATTORNEY'S DICTIONARY OF MEDICINE* F-30 (1977). In Spidle's case, fistulas were present between her intestinal tract and her vagina and also between the intestinal tract and the surgical incision. Record, *supra* note 38, at 101.

45. A brief chronological history of the treatment administered to the plaintiff after the surgery is appropriate.

Aug. 15, 1972: Dr. Kirk Neuberger diagnosed a vaginal fecal fistula and placed plaintiff on a low-residue diet in an effort to control drainage. Record, *supra* note 38, at 101.

Judith Spidle and her husband brought a medical malpractice action against Dr. Steward, an attending physician,⁴⁶ and the hospital⁴⁷ seeking damages for costs of medical care, pain and suffering, loss of earnings, and loss of consortium.⁴⁸ The Spidles' amended complaint alleged two counts of specific acts of negligence and two counts of general negligence based on *res ipsa loquitur*. At the close of the Spidles' case-in-chief, Dr. Steward moved for a directed verdict.⁴⁹ The trial court granted the motion as to the two counts based on *res ipsa loquitur*, reasoning that the surgery was a complicated matter⁵⁰ and that *res ipsa loquitur* was only applicable in situations where the matter at suit was common knowledge.⁵¹ The trial court, however, denied the motion for a directed verdict based on the specific negligence counts and these counts were submitted to the jury.⁵² The jury found for the defendants on both counts of specific negligence.⁵³

Sept. 19, 1972: Defendant Steward administered antibiotics for the fistula and painful urination. *Id.* at 491.

Nov. 13, 1972: Dr. Neuberger performed diagnostic surgery and a small opening in the cervix was cauterized. Plaintiff was discharged with slight drainage. *Id.* at 112-13.

Nov. 26, 1972: Dr. Neuberger readmitted the plaintiff and suggested surgery to control the drainage. The plaintiff refused. *Id.* at 114-15.

Dec. 11, 1972: Dr. William Requarth removed the fistula and portions of the diseased colon. Abstract of Record at 76-77, Spidle v. Steward, 68 Ill. App. 3d 134, 385 N.E.2d 401 (4th Dist. 1979) [hereinafter cited as Abstract].

Mar. 3, 1973: Defendant Steward began treatment with hormone shots and antibiotics. Record, *supra* note 38, at 494-95.

June 28, 1974: Dr. Roberto Manson conducted an exploratory laparotomy and removed Judith Spidle's diseased intestines. Crohn's disease, an inflammatory disorder of the intestinal tract that often causes fistulas, was diagnosed. Abstract, *supra*, at 83-85. The drainage persisted until a year prior to trial. Record, *supra* note 38, at 66-67.

46. Dr. Anton Dippold, who assisted at surgery, was named as a co-defendant; however, he settled with plaintiff prior to jury deliberations, 79 Ill. 2d at 5, 402 N.E.2d at 217.

47. Mattoon Hospital was named as a co-defendant, but settled prior to jury deliberations. *Id.*

48. The Spidles alleged that the defendant failed to exercise the requisite care in performance of hysterectomy insofar as he did not perform sufficient tests and failed to obtain the aid of a specialist. Abstract, *supra* note 45, at 6. Count I of the amended complaint, which alleged specific acts of negligence, sought damages for Judith and Ada Spidle in the amount of \$125,000 for medical care, pain and suffering, and loss of earnings. *Id.* at 2-9. Count II alleged specific acts of negligence and sought damages for Ada Spidle in the amount of \$35,000 for medical expenses and loss of consortium. *Id.* at 9-10. Further, in Count III the Spidles alleged that the defendants were in control of the circumstances surrounding the hysterectomy, that the plaintiffs were in the exercise of ordinary care for their own safety, and that a vaginal fecal fistula was not an ordinary sequela of a hysterectomy. Therefore, the Spidles argued that *res ipsa loquitur* was applicable. In the alternative, the defendant's failure to warn plaintiffs of the attendant risks and consequences of a hysterectomy was pleaded. *Id.* at 14-18. Count III sought damages for Judith and Ada Spidle in the amount of \$125,000 for medical expenses, pain and suffering, and loss of earnings. *Id.* at 14-17. Count IV sought damages of \$35,000 for Ada Spidle in medical expenses and loss of consortium. *Id.* at 17-18.

49. *Id.* at 21-23.

50. Record, *supra* note 38, at 376-78.

51. *Id.*

52. *Id.* at 378.

53. Spidle v. Steward, 68 Ill. App. 3d 134, 134, 385 N.E.2d 401, 402 (4th Dist. 1979).

The Illinois Appellate Court for the Fourth District affirmed.⁵⁴ Although the appellate court recognized that expert testimony may provide the foundation for *res ipsa loquitur* in medical malpractice cases,⁵⁵ it reasoned that the testimony merely established that the fistula was a rare and unusual complication of a hysterectomy.⁵⁶ Consequently, the appellate court held that the testimony of plaintiffs' expert witness was insufficient to satisfy the probability element of the doctrine.⁵⁷

The Illinois Supreme Court granted the plaintiffs' leave to appeal and reversed,⁵⁸ holding that, based on expert testimony of a rare occurrence coupled with evidence of specific acts of negligence, a reasonable person could conclude that the plaintiffs' expert witness believed that the fistula, more probably than not, had negligent antecedents.⁵⁹ Proof of this proposition would, according to the court, establish the foundation for *res ipsa loquitur* and thereby allow the jury to draw a reasonable inference of negligence.⁶⁰

The Court's Reasoning

Mr. Justice Clark, writing for a divided court,⁶¹ stated that the only issues facing the court were the quantity of evidence required to prove the elements of *res ipsa loquitur* and the quantity of evidence needed, as a matter of law, for the trial court to decide if *res ipsa loquitur* applied.⁶² Since it was

54. *Id.* at 140, 385 N.E.2d at 406.

55. *Id.* at 135-36, 385 N.E.2d at 403.

56. *Id.* at 136, 385 N.E.2d at 403.

57. *Id.*

58. 79 Ill. 2d at 5, 402 N.E.2d at 218. The supreme court also affirmed the appellate court's holding that the trial court had not erred in refusing to instruct the jury using plaintiffs' modified version of ILLINOIS PATTERN JURY INSTRUCTION (CIVIL) § 105.01 (2d ed. 1971) (regarding proof of the standard of care and deviation from the applicable standard in medical malpractice actions). 79 Ill. 2d at 13-14, 402 N.E.2d at 221-22.

59. 79 Ill. 2d at 9-10, 402 N.E.2d at 219-20.

60. *Id.* at 13, 402 N.E.2d at 221.

61. Justice Ryan filed a dissenting opinion in which Justice Underwood joined. 79 Ill. 2d at 14-26, 402 N.E.2d at 222-27 (Ryan, J., dissenting). Justice Ryan's dissenting opinion criticized the majority for its liberalization of the doctrine of *res ipsa loquitur*. Justice Ryan's criticism centered on his contention that the ultimate effect of the majority opinion will be to make physicians liable as insurers since *res ipsa loquitur* will now be applicable on proof of an unusual and unfortunate result. *Id.* at 25-26, 402 N.E.2d at 227. In addition, Justice Ryan attacked the majority's reliance on *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967), on the basis that *Clark* is distinguishable from the *Spidle* facts and that it has not been followed in California except in very limited circumstances. 79 Ill. 2d at 17-23, 402 N.E.2d at 223-26. Further, Justice Ryan stated that *Siverson v. Weber*, 57 Cal. 2d 834, 372 P.2d 97, 22 Cal. Rptr. 337 (1962), should have been followed because it refused a *res ipsa loquitur* instruction on proof of rarity of injury alone under facts similar to *Spidle*, 79 Ill. 2d at 23, 402 N.E.2d at 226. See note 114 *infra*. Finally, Justice Ryan argued that if the public policy of the state is to compensate injured plaintiffs at the expense of non-negligent physicians, the legislature should act to provide a system of compensation for those individuals who cannot prove negligence while maintaining the negligence system as a forum for seeking truth. 79 Ill. 2d at 24-26, 402 N.E.2d at 227. See notes 152 & 153 *infra*.

62. 79 Ill. 2d at 6-7, 402 N.E.2d at 218.

stipulated that Judith Spidle was injured while under the control of Dr. Steward and was exercising due care for her own safety, the court further refined the issue to be whether the plaintiffs had satisfied their burden of production as to the probability of *res ipsa loquitur*.⁶³

The *Spidle* court, relying *Drewick v. Interstate Terminals, Inc.*,⁶⁴ held that the directed verdict on the *res ipsa loquitur* counts was erroneous because the testimony of the plaintiffs' expert witness,⁶⁵ coupled with other evidence of specific negligence,⁶⁶ was sufficient to present a jury question regarding the probability of negligence.⁶⁷ Therefore, the court stated, if the jury were initially to find that the plaintiffs' expert believed the fistula more probably than not had negligent antecedents, this evidence would be a sufficient basis from which the jury could infer negligence.⁶⁸ The *Spidle* majority, relying on *Pedrick v. Peoria & Eastern Railroad*,⁶⁹ reasoned that submission of the probability issue to the jury was required to preserve the parties' constitutional right to have serious factual disputes resolved by the jury.⁷⁰ According to the *Spidle* court, the Illinois civil pattern jury instruction was sufficiently cautionary to assure that an inference of negligence would be predicated upon the jury's initial determination that the plaintiffs' expert, despite his equivocal testimony, believed the fistula, more probably than not, was the result of negligence.⁷¹

63. *Id.* at 7-8, 402 N.E.2d at 219.

64. 42 Ill. 2d 345, 247 N.E.2d 877 (1969).

65. Dr. Thomas R. Wilson, called as an expert witness for the plaintiffs, testified concerning the probability element as follows:

Q. Is a hysterectomy, supracervical hysterectomy, removal of the tubes and ovaries, a type of surgery which in the ordinary course, is likely to lead to and have as one of its results, now, in the ordinary course, mind you, in the ordinary course, likely to lead to and have as one of its results, in the absence of any negligence, the formation of fecal vaginal fistulas?

A. This is a rare and unusual complication of hysterectomies.

Q. It is not one one would normally expect, is it?

A. No.

79 Ill. 2d at 8, 402 N.E. 2d at 219.

66. The evidence of specific negligence relied on by the supreme court to support the inference of negligence was testimony by plaintiffs' expert that it is inadvisable to operate while the patient is in an acute stage of pelvic inflammatory disease. *Id.* at 9-10, 402 N.E.2d at 219-20. See Record, *supra* note 38, at 234-44. The court then utilized evidence that the plaintiff was in an acute stage at the time of the surgery. 79 Ill. 2d at 9-10, 21-23, 402 N.E.2d at 220, 225-26. But see note 115 *infra*. Finally, the court relied on testimony from Ada Spidle that the defendant admitted that "he went in a little too soon." 79 Ill. 2d at 9-10, 22, 402 N.E.2d at 219-20, 226. See Record, *supra* note 38, at 353.

67. 79 Ill. 2d at 11, 402 N.E.2d at 220. See notes 120-132 and accompanying text *infra*.

68. *Id.* at 10, 402 N.E.2d at 220.

69. 37 Ill. 2d 494, 229 N.E.2d 504 (1967).

70. 79 Ill. 2d at 10, 402 N.E.2d at 220. See notes 87-96 and accompanying text *infra*.

71. 79 Ill. 2d at 11, 402 N.E.2d at 220. The Illinois pattern instruction on *res ipsa loquitur* reads:

22.01 RES IPSA LOQUITUR

The plaintiff has the burden of proving each of the following propositions:

ANALYSIS AND CRITICISM OF THE SPIDLE OPINION

It is well settled in Illinois that the applicability of the doctrine of *res ipsa loquitur* is a matter of law for the trial judge to decide.⁷² The *Spidle* court recognized this traditional judicial function⁷³ but, nevertheless, effectively delegated the decision on the applicability of the doctrine to the jury.⁷⁴ The majority reasoned that since there were controverted facts in evidence, the trial judge was precluded from ruling on the issue because the parties had the constitutional right to have the disputed facts resolved by the jury.⁷⁵ Therefore, it was for the jury to decide if the proper foundation for *res ipsa loquitur* had been established.⁷⁶

The majority's reasoning that the trial judge should not have ruled on the probability issue is specious. It ignores the rule that it is the duty of the trial judge to decide whether the circumstantial evidence is sufficient to warrant an instruction on *res ipsa loquitur* by performing a preliminary weighing of the evidence to determine if the balance of probabilities favors a finding of negligence.⁷⁷ The rule dictates that if the evidence indicates that a reason-

First: That the plaintiff just before and at the time of the occurrence was using ordinary care for his own safety.

Second: That the plaintiff was [injured] [or] [damaged in his property].

Third: That the [injury] [damage] was received from a (*name of instrumentality*, e.g., a *folding chair*) which [was] [had been] under the defendant's [control] [management].

Fourth: That in the normal course of events, the [injury] [damage] would not have occurred if the defendant had used ordinary care while the (*instrumentality*) was under his [control] [management].

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the (*instrumentality*) while it was under his control or management. If you do draw such an inference your verdict must be for the plaintiff if any injury or damage proximately resulted. But if, on the other hand, you find that any of these propositions has not been proved, or if you find that the defendant had used ordinary care for the safety of others in his management of the (*instrumentality*), then your verdict should be for the defendant.

ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) § 22.01 (2d ed. 1971).

72. 79 Ill. 2d at 7, 402 N.E.2d at 218 (citing *Drewick v. Interstate Terminals, Inc.*, 42 Ill 2d 345, 349, 247 N.E.2d 877, 879 (1969)). See also *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill 2d 446, 449-50, 207 N.E.2d 305, 307 (1965); *Woodward v. Mettelle*, 81 Ill. App. 3d 168, 177, 400 N.E.2d 934, 943 (3d Dist. 1980); *Greenberg v. Michael Reese Hosp.*, 78 Ill. App. 3d 17, 25, 396 N.E.2d 1088, 1094 (1st Dist. 1979).

73. 79 Ill. 2d at 7, 402 N.E.2d at 218.

74. *Id.* at 13, 402 N.E.2d at 221. See notes 87-105 and accompanying text *infra*.

75. 79 Ill. 2d at 10, 402 N.E.2d at 220.

76. *Id.* at 13, 402 N.E.2d at 221.

77. See 2 HARPER & JAMES, *supra* note 6, § 19.4, at 1068-69. The trial court must determine whether the existence of a fact testified to (e.g., that a fistula occurred) is more probably than not attended by another fact (e.g., that fistula are probably caused by negligence). If the court determines the legitimacy of this inferential process, the jury is to determine whether the preponderance of the evidence indicates that the first fact (fistula occurrence) probably did exist, and if so, whether the second fact (a fistula caused by negligence) probably did exist. *Id.* See also 9 WIGMORE, *supra* note 2, § 2487, at 280-81; James, *Judge and Jury*, *supra* note 11, at 672-75; Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 194 (1949).

able person could conclude that negligence is more likely than not the cause of the injury, an inference of negligence would be reasonable. Conversely, if no such balance of probabilities exists, *res ipsa loquitur* would not be applicable.⁷⁸ When ruling on this preliminary issue the trial judge must assess the probative value of the evidence needed to satisfy the requirements of the law.⁷⁹ According to *Spidle*, however, the jury must now perform the traditional function of the trial judge when there are facts in dispute.⁸⁰

The initial determination that is usually made by the trial judge, although not foolproof,⁸¹ is essential in situations where the medical procedures involved are not a matter of common knowledge.⁸² In such cases, expert testimony must establish that the occurrence is such as would not happen in the ordinary course of things absent negligence.⁸³ By allowing the jury to determine the applicability of the doctrine in cases involving complex medical procedures, the *Spidle* decision invites jurors to speculate as to the cause of the injury. The decision to be made by the jury in cases such as *Spidle* is conjectural because the jurors do not possess adequate knowledge,⁸⁴ nor are

78. See *Hahn v. Eastern Ill. Office Equip. Co.*, 42 Ill. App. 3d 29, 32, 355 N.E.2d 336, 339 (4th Dist. 1976); 2 HARPER & JAMES, *supra* note 6, § 19.4, at 1068; PROSSER, *supra* note 6, § 39, at 218.

Dean Prosser, in defining the trial court's function in ruling on the applicability of *res ipsa loquitur*, stated that "[a]s long as the conclusion is a matter of mere speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that the burden of proof has not been sustained." *Id.* at 211-12.

79. See James, *Judge and Jury*, *supra* note 11, at 670-71, 673-75. Although questions of fact are generally for the jury to decide, Thayer has stated that "[t]he maxim '*ad questionem facti non respondent iudices, ad questionem juris non respondent iuratores*' [judges do not answer question of fact; juries do not answer question of law], was never true if taken absolutely." J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185 (1898) (italics in original).

80. 79 Ill. 2d at 10-13, 402 N.E.2d at 220-21. See notes 72-76 and accompanying text *supra*.

81. Professor James has argued that since this determination is based on mathematical probabilities that do not easily conform to the language of law, the determination to be made by the trial judge is one of "delusive exactness." 2 HARPER & JAMES, *supra* note 6, § 19.4, at 1069-71. Nevertheless, it keeps the law in touch with societal notions of policy and expediency while assuring that verdicts are based on more than speculation. *Id.* at 1068-71.

82. See notes 89-105 and accompanying text *infra*.

83. *Walker v. Rumer*, 72 Ill. 2d 495, 500, 381 N.E.2d 689, 691 (1978). See notes 28-37 and accompanying text *supra*.

84. It was undisputed in *Spidle* that the hysterectomy performed on Judith Spidle was a procedure that was not a matter of common knowledge. 79 Ill. 2d at 8-10, 402 N.E.2d at 219-20. *Accord*, *Siverson v. Weber*, 57 Cal. 2d 834, 372 P.2d 97, 57 Cal. Rptr. 337 (1962). In such complex situations expert testimony is required to establish "whether 'the occurrence is such as in the ordinary course of things would not have happened' if the party exercising control or management had exercised proper care." *Walker v. Rumer*, 72 Ill. 2d 495, 500, 381 N.E.2d 689, 691 (1978). See notes 28-37 and accompanying text *supra*. Cf. *Walski v. Tiesenga*, 72 Ill. 2d 249, 256, 381 N.E.2d 279, 282 (1978) (expert testimony needed to support a charge of malpractice because jurors are not skilled in the practice of medicine and would have difficulty determining lack of skill on part of physician without the aid of expert medical testimony).

they provided with sufficient additional relevant information,⁸⁵ to reach a conclusion as to the validity of an expert witness's professional opinion from that witness's inconclusive testimony and other evidence of specific negligence.⁸⁶

The *Spidle* majority also erred in reasoning that a submission of controverted factual disputes to the jury was consonant with the *Pedrick v. Peoria & Eastern Railroad* directed verdict test.⁸⁷ The *Pedrick* directed verdict standard preserves the constitutional right to a jury trial by requiring verdicts to be directed and judgments *n.o.v.* entered in cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict could ever stand.⁸⁸ The *Spidle* court's interpretation of *Pedrick*, however, failed to recognize that the right to a jury trial is not absolute.

The right to a jury verdict exists only when there are serious factual disputes.⁸⁹ *Pedrick* held that directed verdicts are constitutional, and that the fact that there is "some" evidence offered to support an issue does not compel submission of that issue to the jury.⁹⁰ Thus, the *Spidle* court misinterpreted the *Pedrick* standard for a directed verdict by requiring a jury trial when there is merely some evidence of a disputed factual issue. Although the *Spidle* majority believed there to be a serious factual dispute, when the *Pedrick* standard for a directed verdict is applied to the *Spidle* facts, it cannot be said that the directed verdict for the defendant was erroneous.

The *Pedrick* test requires that directed verdicts be granted only if all the evidence, when viewed in a light most favorable to the nonmovant, is so overwhelmingly in the movant's favor that a contrary verdict could never stand.⁹¹ Therefore, in order to establish a balance of probabilities in favor of negligence, and thus avoid a directed verdict, the plaintiffs in *Spidle* would have had to establish by expert testimony that the formation of a

85. See notes 97-105 and accompanying text *infra*.

86. 79 Ill. 2d at 9-10, 402 N.E.2d at 219-20.

87. *Id.* at 10, 402 N.E.2d at 220.

88. 37 Ill. 2d at 504-05, 510, 229 N.E.2d at 510, 513-14.

89. *Id.* at 504-05, 229 N.E.2d at 510.

90. *Id.* In formulating the directed verdict test, the *Pedrick* court reasoned:

[T]he presence of *some* evidence of a fact which, when viewed alone may seem substantial, does not always, when viewed in the context of all of the evidence, retain such significance. As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole.

Id. (emphasis in original). The Illinois Supreme Court rationalized the more stringent directed verdict test as being in the interest of more "efficient and expeditious" administration of justice when there is only *some* evidence of a dubious probative nature in support of an issue. *Id.* at 504, 229 N.E.2d at 510. See generally Note, *Evidence—Sufficiency for Directed Verdicts—Can a Judge Hold a Candle to Twelve Reasonable Men?*, 18 DEPAUL L. REV. 322 (1968); Recent Decisions, *Civil Procedure: Directed Verdicts—New Test Promulgated by Illinois Supreme Court for the Determination of the Evidentiary Situation in Which a Verdict May Be Directed*, 56 ILL. B.J. 782 (1968).

91. 37 Ill. 2d at 510, 229 N.E.2d at 513-14.

vaginal fecal fistula following a hysterectomy would not have occurred in the ordinary course of things absent negligence.⁹² Clearly, as the majority opinion conceded, the plaintiffs' expert witness did not establish that proposition.⁹³ The plaintiffs' expert only indicated that the fistula was a rare and unusual complication following a hysterectomy.⁹⁴ Expert testimony that fails in its intended purpose has the same effect on the litigation as if no expert witness had testified.⁹⁵ Since the testimony of the plaintiffs' expert had dubious probative value, the plaintiffs failed to sustain their burden of production regarding the probability element of *res ipsa loquitur*.⁹⁶ Therefore, the evidence was so overwhelmingly in the defendant's favor that a verdict for the plaintiffs could never stand based on the *Pedrick* standard.

The *Spidle* court, however, relied on the expert evidence of a rare occurrence⁹⁷ and other evidence of specific negligence⁹⁸ to require submission of the probability element of *res ipsa loquitur* to the jury.⁹⁹ The majority reasoned that the combination of this evidence, when viewed in a light most favorable to the plaintiffs, was sufficient to allow a reasonable person to conclude that the plaintiffs' expert witness believed that the fistula, more probably than not, resulted from the defendant's negligence.¹⁰⁰ The *Spidle*

92. See notes 28-37 and accompanying text *supra*.

93. 79 Ill. 2d at 9, 402 N.E.2d at 219-20.

94. *Id.* at 8, 402 N.E.2d at 219. See also note 65 *supra*. Justice Ryan, in his dissenting opinion, argued that the plaintiffs' expert witness had failed to properly establish the probability element of *res ipsa loquitur*. 79 Ill. 2d at 20, 402 N.E.2d at 225 (Ryan, J., dissenting). In commenting on this failure, Justice Ryan stated:

The most that Dr. Wilson, plaintiff's expert witness, would say is that "this is a rare and unusual complication." There is no evidence that it is rare and unusual *if due care is used*. The attorney was well aware of what he had to prove. He did not get Dr. Wilson to give the answer that was necessary. The simple fact is that the plaintiff did not prove that which was required. We have no indication as to why the attorney did not pursue the matter further. It may well be that through the use of a discovery deposition he was aware that Dr. Wilson would not say that this occurrence would not ordinarily happen in the absence of negligence, or under the *Clark v. Gibbons* test that it is rare when due care is exercised. In any event, all that is in the record is that it is a rare and unusual complication.

Id. (emphasis in original).

95. *Stevenson v. Nauton*, 71 Ill. App. 3d 831, 836, 390 N.E.2d 53, 57 (1st Dist. 1979) (summary judgment for defendant; expert testimony that fails in its intended purpose had the same effect on the litigation as if no expert witness testified). Cf. *Walski v. Tiesenga*, 72 Ill. 2d 249, 259-62, 381 N.E.2d 279, 283-85 (1978) (directed verdict granted for defendant; plaintiff's expert witnesses failed to establish the applicable standard of medical care). See also *Conrad v. Christ Community Hosp.*, 77 Ill. App. 3d 337, 395 N.E.2d 1158 (1st Dist. 1979); *Kwak v. St. Anthony DePadua Hosp.*, 54 Ill. App. 3d 719, 369 N.E.2d 1346 (1st Dist. 1977); *Sanders v. Frost*, 112 Ill. App. 2d 234, 251 N.E.2d 105 (5th Dist. 1969).

96. 79 Ill. 2d at 20, 402 N.E.2d at 225 (Ryan, J., dissenting).

97. 79 Ill. 2d at 8, 402 N.E.2d at 219. See note 65 *supra*.

98. 79 Ill. 2d at 9-10, 402 N.E.2d at 220. See note 66 *supra*.

99. See notes 61-71 and accompanying text *supra*.

100. 79 Ill. 2d at 9-10, 402 N.E.2d at 219-20.

majority's application of *res ipsa loquitur* is the functional equivalent of the conditional formulation of the doctrine as developed in California.¹⁰¹

Conditional *res ipsa loquitur* is a hybrid doctrine that combines elements of the traditional negligence formula and the traditional formulation of *res ipsa loquitur*.¹⁰² The conditional form of *res ipsa loquitur* allows the jury to determine if the balance of probabilities favors negligence, and thus if the doctrine applies, based on evidence of a rare occurrence in conjunction with other evidence of specific acts of negligence which could have caused the injury in question.¹⁰³ As in any *res ipsa loquitur* case, an inference of negligence is contingent upon the jury's initial determination that the occurrence was one that would not have happened in the ordinary course of things absent negligence.¹⁰⁴ The significance of conditional *res ipsa loquitur*, however, is the lesser amount and quality of evidence required to submit the issue to the jury. The rationale underlying conditional *res ipsa loquitur* is that when there is evidence that the physician performed a negligent act that could have caused the injury in question, that evidence logically increases the probability that negligence was the cause.¹⁰⁵

101. See generally 2 DOOLEY, *supra* note 6, § 34.66. Perhaps the best illustration of the operation of conditional *res ipsa loquitur* is contained in *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967). In *Clark*, the plaintiff underwent surgery, a bone reduction to repair a fractured ankle. *Id.* at 402-05, 426 P.2d at 528-29, 58 Cal. Rptr. at 128-29. The plaintiff was anesthetized and the operation was begun. Approximately one hour into the operation the anesthetic began to wear off prematurely. *Id.* at 404, 426 P.2d at 529, 58 Cal. Rptr. at 129. The operation was terminated and, as a result, the plaintiff developed osteoarthritis of the ankle. *Id.* at 404-05, 426 P.2d at 529, 58 Cal. Rptr. at 129. The California Supreme Court held that the administration of an anesthetic was a commonplace procedure and therefore evidence that anesthetics do not normally wear off if proper care is used, coupled with evidence of specific negligence on the part of the defendant in rashly terminating the surgery, was sufficient for the jury to find that the injury was probably the result of negligence. *Id.* at 413-14, 426 P.2d at 535, 58 Cal. Rptr. at 135. The *Clark* decision has been criticized as an attempt to shape the confusing body of case law on conditional *res ipsa loquitur* into a rational formula to apply in negligence cases and as having the effect of obviating the need for establishing the probability element of the doctrine. See Note, *Res Ipsa Loquitur: Deviation in Medical Malpractice Cases*, 56 GEO. L.J. 805 (1968) (reviewing *Clark*) [hereinafter cited as *Res Ipsa Loquitur: Deviation*].

The California court's treatment of *res ipsa loquitur* has been vigorously criticized as a rule of sympathy that allows liability to be imposed arbitrarily by the jury. See *Clark v. Gibbons*, 66 Cal. 2d 399, 415-16, 426 P.2d 525, 536-37, 58 Cal. Rptr. 125, 136-37 (1967) (Tobriner, J., concurring). See generally Adamson, *Medical Malpractice: Misuse of Res Ipsa Loquitur*, 46 MINN. L. REV. 1043 (1962); Morris, "Res Ipsa Loquitur"—Liability Without Fault, 25 INS. COUNSEL J. 97 (1958); Rubsamen, *supra* note 21, at 251; Note, *Res Ipsa Loquitur in California Medical Malpractice Law—Quintal v. Laurel Grove Hospital*, 18 HASTINGS L.J. 691 (1967).

102. See *Res Ipsa Loquitur: Deviation*, *supra* note 101, at 805.

103. See *Clark v. Gibbons*, 66 Cal. 2d 399, 413, 426 P.2d 525, 534-35, 58 Cal. Rptr. 125, 134-35 (1967). See also *Res Ipsa Loquitur: Deviation*, *supra* note 101, at 809-10.

104. See notes 6-11 & 71 and accompanying text *supra*.

105. *Clark v. Gibbons*, 66 Cal. 2d 399, 413, 426 P.2d 525, 534-35, 58 Cal. Rptr. 125, 134-35 (1967); *Quintal v. Laurel Grove Hosp.*, 62 Cal. 2d 154, 163-66, 397 P.2d 161, 167-68, 41 Cal. Rptr. 577, 583-84 (1964). See also Comment, *Res Ipsa Loquitur: Its Place in Medical Malpractice Litigation*, 8 U.S.F. L. REV. 343, 350-52 (1973).

In California the application of conditional *res ipsa loquitur* has been limited to cases involving medical procedures that are within the common knowledge of the jury.¹⁰⁶ Application of conditional *res ipsa loquitur* is limited to commonplace situations because any inference of negligence must arise from the happening of the accident¹⁰⁷ and when the accident results from complex medical procedures, the probabilities of negligence cannot be established solely by reference to the common knowledge of the jury.¹⁰⁸ *Spidle*, however, allows for the application of the equivalent of conditional *res ipsa loquitur* to litigation involving a complex medical procedure.¹⁰⁹ Although the *Spidle* decision did not explicitly adopt conditional *res ipsa loquitur*, by allowing the jury to determine the applicability of *res ipsa loquitur* based on evidence of specific acts of negligence coupled with evi-

106. 79 Ill. 2d at 18-23, 402 N.E.2d at 224-26 (Ryan, J., dissenting) (review of California precedent which suggests limitation of conditional *res ipsa loquitur* to situations within the common knowledge of the jury). See, e.g., *Clemens v. Regents of Univ. of Cal.*, 8 Cal. App. 3d 1, 12, 87 Cal. Rptr. 108, 116 (1970) (conditional *res ipsa loquitur* inapplicable; isolation perfusion not a matter of common knowledge); *Fraser v. Sprague*, 270 Cal. App. 2d 736, 745, 76 Cal. Rptr. 37, 43 (1969) (evidence of rarity together with some other evidence indicating negligence may warrant a conditional *res ipsa* instruction, particularly if the injury resulted from a commonplace procedure rather than from a complex or unusual operation; *res ipsa loquitur* applicable since nerve injury resulted from commonplace surgery).

One California appellate court, however, did allow a conditional *res ipsa loquitur* instruction in an action concerning stereotaxic neurosurgery, a highly complex procedure. *Belshaw v. Feinstein*, 258 Cal. App. 2d 711, 65 Cal. Rptr. 788 (1968). The *Belshaw* court recognized that the plaintiff's expert witnesses did not establish that the injury was probably the result of negligence. Nevertheless, the court felt compelled by *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967), to grant a conditional *res ipsa loquitur* instruction since there was evidence of a low incidence of injuries in these operations and evidence of specific acts of negligence. 258 Cal. App. 2d at 721-22, 65 Cal. Rptr. at 794-95. The *Belshaw* court, however, although relying on *Clark*, failed to acknowledge that *Clark* involved a procedure that was commonplace. 66 Cal. 2d at 413, 426 P.2d at 535, 58 Cal. Rptr. at 135. (administration of spinal anesthesia is commonplace). Therefore, *Belshaw* allowed jury speculation on the probability element since the jurors were not provided with any information to assist them in evaluating the conduct of the defendant doctor in complex neurosurgery. The *Belshaw* court's application of *res ipsa loquitur* has not been followed in subsequent decisions. In the respect that *Belshaw* allowed the jury to speculate as to the probabilities of negligence without sufficient expert testimony, it is very similar to the *Spidle* decision. See notes 111-119 and accompanying text *infra*.

107. *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 448-49, 207 N.E.2d 305, 307 (1965). *Accord*, *Tomei v. Henning*, 67 Cal. 2d 319, 322-23, 431 P.2d 633, 635, 62 Cal. Rptr. 9, 11 (1967); *Clark v. Gibbons*, 66 Cal. 2d 399, 422, 426 P.2d 525, 541, 58 Cal. Rptr. 125, 141 (1967) (Traynor, C.J. concurring and dissenting); *Fraser v. Sprague*, 270 Cal. App. 2d 736, 746, 76 Cal. Rptr. 37, 43-44 (1969).

108. See *Folk v. Kilk*, 53 Cal. App. 3d 176, 187, 126 Cal. Rptr. 172, 179-80 (1975) (application of conditional *res ipsa loquitur* to an action involving a complex medical procedure would allow the jury to create its own medical standard of care and would allow it to project a knowledge of the procedure greater than that possessed by a specialist); *Clemens v. Regents of Univ. of Cal.*, 8 Cal. App. 3d 1, 12, 87 Cal. Rptr. 108, 116 (1970) (lack of expert testimony in an action involving a complex medical procedure could not be remedied by reference to common experience; conditional *res ipsa loquitur* inapplicable).

109. See note 84 *supra*.

dence of rarity of injury, the Illinois Supreme Court implicitly recognized the validity of the conditional *res ipsa loquitur* doctrine.¹¹⁰

The wisdom of limiting the application of conditional *res ipsa loquitur* to cases involving procedures that are commonplace is demonstrated by the facts in *Spidle*. The *Spidle* majority's reliance on the conditional form of *res ipsa loquitur* was clearly ill-advised because the question of whether the formation of a vaginal fecal fistula may result from a hysterectomy, in the absence of negligence, is beyond the common knowledge of a lay jury.¹¹¹ When complex medical procedures are involved and the plaintiff seeks a *res ipsa loquitur* instruction, medical expertise is required to inform the jury of the probability that an injury resulted from negligence.¹¹² Thus, when the plaintiff's expert fails to inform the jury as to probabilities of negligence, the plaintiff has not satisfied his burden of production.¹¹³ The plaintiff, therefore, should not be entitled to a jury verdict because there is no foundation in the evidence from which the jury could draw a reasonable inference of negligence.¹¹⁴

Moreover, the additional evidence¹¹⁵ relied on by the *Spidle* majority to support an inference of negligence could not possibly assist a lay jury to

110. The *Spidle* majority did not explicitly recognize the applicability of conditional *res ipsa loquitur* in Illinois medical malpractice actions. However, by holding that evidence of rarity of occurrence plus evidence of specific acts of negligence required submission of the probability element to the jury, 79 Ill. 2d at 8-10, 402 N.E.2d at 219-20, the Illinois Supreme Court applied *res ipsa loquitur* in a similar manner as have the California courts. See note 101 *supra*. The California courts, however, have been reluctant to apply conditional *res ipsa loquitur* to complex medical procedures; therefore, the application of the conditional form of the doctrine is a liberalization of *res ipsa loquitur* to an extent not recognized in other jurisdictions. See note 106 *supra*. Further, the *Spidle* majority's reliance on *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967), is an implicit recognition of the validity of conditional *res ipsa loquitur*. 79 Ill. 2d at 11, 402 N.E.2d at 220-21.

111. See note 84 *supra*.

112. *Walker v. Rumer*, 72 Ill. 2d 495, 500, 381 N.E.2d 689, 691 (1978). See also note 37 *supra*.

113. See notes 8, 11 & 17 *supra*.

114. Justice Ryan, in his dissenting opinion, referred to a California case factually similar to *Spidle* where the California Supreme Court refused to apply *res ipsa loquitur*. 79 Ill. 2d at 23, 402 N.E.2d at 226 (Ryan, J., dissenting) (discussing *Siverson v. Weber*, 57 Cal. 2d 834, 372 P.2d 97, 22 Cal. Rptr. 337 (1962)). In *Siverson*, the California Supreme Court held that *res ipsa loquitur* did not apply when a bladder fistula appeared several days after a hysterectomy since the evidence merely established a rarity of injury. 57 Cal. 2d at 837-40, 372 P.2d at 98-100, 22 Cal. Rptr. at 338-40. The *Siverson* court reasoned that fistula formation is an inherent risk of a hysterectomy and thus:

Where risks are inherent in an operation and an injury of a type which is rare does occur, the doctrine should not be applicable unless it can be said that, in light of past experience, such an occurrence is more likely the result of negligence than some cause for which the defendant is not responsible.

Id. at 839, 322 P.2d at 99-100, 22 Cal. Rptr. at 339-40. As Justice Ryan indicated, the absence of specific acts which would have caused the injury in *Siverson* distinguish that case from *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967), and make *Siverson* the more appropriate precedent to apply to *Spidle*. 79 Ill. 2d at 23, 402 N.E.2d at 226 (Ryan, J., dissenting).

115. The evidence of specific negligence relied on by the *Spidle* majority to strengthen the probabilities of negligence was not evidence that tended to show what might have caused the

comprehend the procedures and consequences of a hysterectomy, nor could it provide the jury with a basis from which to determine the credibility of the plaintiffs' expert witness.¹¹⁶ The *Spidle* majority, however, seemed to be particularly persuaded by the trial court's ruling that there was sufficient evidence to avoid a directed verdict on the count's alleging specific negligence.¹¹⁷ The effect of allowing a jury to draw an inference of negligence based solely on the type of evidence adduced at the *Spidle* trial would be to permit the jury to determine on its own which of the many possible causes of the fistula was responsible for Judith Spidle's injuries.¹¹⁸ Any inference of negligence based on this evidence would be only speculation because the jury

fistula. First, the testimony that surgery is contraindicated when the patient is in an acute stage of pelvic inflammatory disease, Record, *supra* note 38, at 241-44, is not evidence of a breach of accepted medical practice because it was also established that the acute stage of pelvic inflammatory disease is characterized by a high fever and an elevated white blood count (12,000 and above), *id.*, and that the plaintiff's white blood cell count at the time of the surgery was 10,900 and the plaintiff was not running a fever. *Id.* at 474-75. Further, it was shown that the laboratory standards of Mattoon Hospital consider 11,000 the white blood cell count beyond which surgery would be contraindicated. *Id.* at 447. The fact that the defendant adhered to the standard of care in this instance does not strengthen the inference of negligence.

Additionally, the admission evidence that the defendant "went in a little too soon" does not strengthen the inference of negligence. *Id.* at 352. Since the plaintiff's condition did not indicate an acute stage of the disease, the decision to operate was a judgment decision made by the attending surgeon who had complete knowledge of the plaintiff's condition. It is well-settled in Illinois that a physician is not liable for errors in judgment unless breach of a standard of medical care is proved. See, e.g., *Crawford v. Anagnostopoulos*, 69 Ill. App. 3d 954, 387 N.E.2d 1064 (1st Dist. 1979); *Borowski v. Von Solbrig*, 14 Ill. App. 3d 672, 303 N.E.2d 146 (1st Dist. 1973), *aff'd*, 60 Ill. 2d 418, 328 N.E.2d 301 (1975). Thus, the admission evidence, even though denied, Record, *supra* note 38, at 282, is not evidence of an act which could have caused the injury. See *Contreras v. St. Luke's Hosp.*, 78 Cal. App. 3d 919, 932, 144 Cal. Rptr. 647, 656 (1978) (conditional *res ipsa loquitur* refused where the evidence did not show a specific act or omission which could have caused the injury). Thus, the evidence was too inconclusive in *Spidle* to increase the probability that negligence was the cause of the fistula since the specific acts of negligence relied on by the *Spidle* majority were not shown to have been capable of causing the fistula. 79 Ill. 2d at 20-23, 402 N.E.2d at 225-26 (Ryan, J., dissenting).

116. See note 108 *supra*.

117. 79 Ill. 2d at 11-12, 402 N.E.2d at 221. The *Spidle* court stated:

When the trial judge in the instant case permitted the ordinary negligence counts to go to the jury, he ruled that a verdict finding the defendant liable could stand. The evidence sufficient to hold defendant liable under negligence specifically does not eliminate the *res ipsa loquitur* doctrine; rather, the foundation for it and the inference of negligence permitted under it were strengthened, at least to the extent of presenting a jury question.

Id. (citations omitted). This approach was vigorously criticized by Chief Justice Traynor of the California Supreme Court in his dissenting opinion in *Clark v. Gibbons*, 66 Cal. 2d 339, 422, 426 P.2d 525, 541, 58 Cal. Rptr. 125, 141 (1967) (Traynor, C.J., concurring and dissenting) (inference to be drawn is to be from the happening of the accident alone, not from evidence of defendant's conduct).

118. Expert testimony introduced at trial indicated that vaginal fecal fistulas could be caused by radiation therapy, cancer, surgical trauma, the spread of infectious processes, or any combination of the above. Record, *supra* note 38, at 101.

was not provided with sufficient information to evaluate complex medical procedures.¹¹⁹

The *Spidle* majority further erred in relying on *Drewick v. Interstate Terminals, Inc.*¹²⁰ to support its application of res ipsa loquitur. The Illinois Supreme Court in *Drewick* held that since there were controverted facts in evidence concerning the control element of res ipsa loquitur, that issue was properly submitted to the jury under a cautionary instruction.¹²¹ That issue, whether the defendant was in control of the premises from which a window sash fell, was a prerequisite to an inference that the defendant lessor was negligent.¹²² The *Spidle* majority felt that *Drewick* illustrated the preferred approach to res ipsa loquitur when there are controverted facts in evidence; therefore, the *Spidle* court concluded that the probability issue should have been treated in the same manner as the *Drewick* court treated the control issue.¹²³ That is, according to *Spidle*, the issue of probabilities should have been submitted to the jury under a cautionary instruction because there were controverted facts in evidence.¹²⁴

Spidle's reliance on *Drewick* is suspect because in *Drewick* the application of res ipsa loquitur was consistent with the traditional operation of the doctrine.¹²⁵ As Justice Ryan indicated in his dissenting opinion in *Spidle*, the *Drewick* decision merely stands for the proposition that the applicability of res ipsa loquitur is a question of law for the trial judge.¹²⁶ By instructing the jury on res ipsa loquitur, the trial judge in *Drewick* made the determination

119. See *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967) (Traynor, C.J., concurring and dissenting). In *Clark*, Chief Justice Traynor stated:

Such an inference [of negligence] must be based on more than speculation. If it is to be drawn from the happening of an accident, there must be common knowledge or expert testimony that when such an accident occurs, it is more probably than not the result of negligence. A showing that such an accident rarely occurs does not justify an inference of negligence without a further showing that when the rare event happens, it is more likely than not caused by negligence.

Nor does evidence of specific negligence justify an inference of negligence based on res ipsa loquitur, for the inferences the jury may reasonably draw from the happening of the accident alone obviously cannot be determined by evidence of the defendant's conduct.

Id. at 422, 426 P.2d at 541, 58 Cal. Rptr. at 141 (citations omitted). *Accord*, *Comte v. O'Neil*, 125 Ill. App. 2d 450, 454, 261 N.E.2d 21, 23 (4th Dist. 1970) ("To permit a jury to impose a liability for breach of a standard of conduct which is neither established by evidence nor within the area of common knowledge or gross negligence is pure speculation."). See also *Schnear v. Boldrey*, 22 Cal. App. 3d 478, 486, 99 Cal. Rptr. 404, 409 (1971) (absent expert testimony in an action involving a complex medical procedure, an inference of negligence based on res ipsa loquitur could only be reached by speculation on the part of the jury).

120. 42 Ill. 2d 345, 247 N.E.2d 877 (1969).

121. *Id.* at 351, 247 N.E.2d at 880.

122. *Id.*

123. 79 Ill. 2d at 10-11, 402 N.E.2d at 220.

124. *Id.*

125. See notes 6-11 and accompanying text *supra*.

126. 79 Ill. 2d at 16, 402 N.E.2d at 223 (Ryan, J., dissenting).

that the doctrine was applicable.¹²⁷ The *Drewick* court's use of the cautionary language¹²⁸ was merely in recognition of the requirements of the Illinois pattern jury instruction that requires the jury to find that each element of *res ipsa loquitur* has been proved prior to drawing an inference of negligence.¹²⁹ The *Drewick* decision, therefore, does not support the *Spidle* court's holding that the trial court should have allowed the jury to determine if an adequate foundation had been established for *res ipsa loquitur* to be applied.

By allowing the jury to decide the applicability of *res ipsa loquitur* in cases involving complex medical procedures, the *Spidle* court expanded the use of *res ipsa loquitur* to an extent not previously allowed.¹³⁰ This judicial liberalization of the doctrine is unwarranted, however, because various statutory and common law innovations have greatly alleviated the burdensome problems of proof that injured plaintiffs have traditionally encountered.¹³¹ Any

127. Although *Drewick* is not absolutely clear on the issue of what determination was properly left to the jury, it appears from the opinion that the trial judge had already ruled on the applicability of the doctrine and that it was then for the jury to weigh the strength of the inference of negligence. 42 Ill. 2d at 349, 247 N.E.2d at 879.

128. *Id.* at 351, 247 N.E.2d at 880.

129. ILLINOIS PATTERN JURY INSTRUCTION (CIVIL) § 22.01 (2d ed. 1971). *See also* note 71 *supra*.

130. *See* notes 106-119 and accompanying text *supra*.

131. *See* notes 20-22 and accompanying text *supra*.

The courts and legislature have made great progress in addressing the problems of proof that plaintiffs have traditionally encountered as a result of the "conspiracy of silence." Perhaps the most significant development has been the gradual abandonment of the strict locality rule for determining the applicable standard of care. *See generally* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 569-75 (1959). The strict locality rule required a medical professional to possess and exercise the skill and knowledge of a practitioner in good standing in the same locality. *See, e.g.,* Schireson v. Walsh, 354 Ill. 40, 57, 187 N.E. 921, 927 (1933); Bacon v. Walsh, 184 Ill. App. 377, 379 (3d Dist. 1913). The rationale for this strict standard was that it was impractical to hold a rural physician to the same standard as a physician practicing in a metropolitan area since the urban practitioner generally is better equipped in terms of facilities and information. *See* Stogsdill v. Manor Convalescent Home, Inc., 35 Ill. App. 3d 634, 653, 343 N.E.2d 589, 603-04 (2d Dist. 1976). *See also* Comment, *Medical Malpractice—Expert Testimony*, 60 NW. U.L. REV. 834, 837 (1966). Since only an expert from that same locale would be competent to testify as to the applicable standard of care under the strict locality rule, the economic repercussions and professional ostracism that might befall the willing expert are obvious. *See* 1 LOUISELL & WILLIAMS, *supra* note 6, at 14.03; *Medical Testimony*, *supra* note 18, at 336-38.

The strict locality rule has been tempered in its application to require a physician to possess and apply the knowledge and use the skill and care that is ordinarily used by reasonably well-qualified practitioners in the same or similar locality in similar cases and circumstances. *See* ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) § 105.01 (2d ed. 1971). Therefore, the requisite standard can be established by a physician from a different locality who would be under less external pressure to refrain from testifying. *See Medical Testimony*, *supra* note 18, at 338. The reasoning behind the relaxation of the strict locality rule is that with advances in communications, technology, and transportation the standard of medical practice is fairly uniform throughout the country. *Id.* *See also* ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) § 105.01, Comment (2d ed. 1971). For a criticism of the locality rule, even in its expanded sense, *see* Comment, *A Review of the Locality Rule*, 1969 U. ILL. L.F. 96.

application that differs so greatly from prior case law only lends credence to the argument that the doctrine is no more than a rule of sympathy that is applied as a means of social insurance.¹³²

THE PRACTICAL RAMIFICATIONS OF SPIDLE

The *Spidle* decision will have a pervasive impact on the conduct of medical malpractice litigation in several respects. Initially, by reaffirming the *Drewick* holding that the applicability of *res ipsa loquitur* is a matter of law for the trial judge, but then submitting the issue of applicability to the jury, the *Spidle* court has created a nebulous precedent that will be a source of great confusion to trial courts. *Spidle* provides no standard to guide trial courts in ruling on the applicability of *res ipsa loquitur*. Additionally, allowing the jury to determine the applicability of the doctrine prior to drawing an inference of negligence provides no safeguards against the jury reaching the ultimate issue of negligence without addressing the threshold issue of probability upon which an inference of negligence is contingent.¹³³ Finally, the *Spidle* decision will also substantially affect the traditional burdens of proof in civil litigation.¹³⁴ One major purpose of *res ipsa loquitur* is to ensure that relevant explanatory evidence is introduced at trial by the de-

The Illinois General Assembly has also helped plaintiffs by allowing the use of defendants as expert witnesses to establish a standard of care. See ILL. REV. STAT. ch. 110, § 60 (1979) (defendant may testify as to standard of care yet plaintiff is not bound by defendant's testimony). See, e.g., *Comte v. O'Neil*, 125 Ill. App. 2d 450, 452-54, 261 N.E.2d 21, 22 (4th Dist. 1970) (defendant doctor able to establish the accepted standard of care; testimony merely relating course of treatment is insufficient); *Newman v. Spellberg*, 91 Ill. App. 2d 310, 320-26, 234 N.E.2d 152, 157-60 (1st Dist. 1968) (plaintiff's occurrence testimony sufficient to establish deviation from standard of care that was established by defendant).

Further, the use of medical texts and treatises as evidence has greatly assisted plaintiffs in proving negligence. It is well-settled in Illinois that medical texts and treatises can supply the basis for cross examination of expert witnesses if the court takes judicial notice of the author's expertise and competence. *Darling v. Charleston Community Mem. Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965). See generally Note, *Overcoming the "Conspiracy of Silence": Statutory and Common-Law Innovations*, 45 MINN. L. REV. 1019 (1961); Comment, *Medical Malpractice—Expert Testimony*, 60 NW. U.L. REV. 834, 844-49 (1966); *Medical Testimony*, *supra* note 18, at 341-42. Finally, it has been argued that since courts have begun to apply *res ipsa loquitur* to malpractice actions involving complex medical procedures, expert witnesses will be more willing to testify as to the probability of negligence in a given situation than to testify that a specific act or omission of a fellow doctor was negligent. *Application*, *supra* note 18, at 865.

132. See 79 Ill. 2d at 23-26, 402 N.E.2d at 226-27 (Ryan, J., dissenting); *Clark v. Gibbons*, 66 Cal. 2d 399, 415-21, 426 P.2d 525, 536-40, 58 Cal. Rptr. 125, 136-40 (Tobriner, J., concurring). See also Adamson, *Medical Malpractice: Misuse of Res Ipsa Loquitur*, 46 MINN. L. REV. 1043, 1055 (1962); Morris, "Res Ipsa Loquitur"—Liability Without Fault, 25 INS. COUNSEL J. 97, 99 (1958); Rubsamen, *supra* note 21, at 251.

133. Justice Tobriner of the California Supreme Court, concurring in *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967), stated that "[t]o give a *res ipsa* instruction under such circumstances invites a purely speculative leap and entrusts the jury with unreviewable power to impose or withhold liability as it see fit." *Id.* at 415-16, 426 P.2d at 536-37, 58 Cal. Rptr. at 136-37.

134. See note 2 *supra*.

fendant.¹³⁵ The burden of production is thus shifted to the defendant in the sense that if he or she fails to introduce explanatory information as to the cause of the injury, the jury will most likely find for the plaintiff.¹³⁶ Because *Spidle* substantially alleviates a plaintiff's burden of production in malpractice actions, the onus is placed on the defendant to conclusively prove freedom from negligence.¹³⁷ Although the operation of *res ipsa loquitur* was never intended to shift the ultimate burden of persuasion,¹³⁸ this is the result of *Spidle* if, as seems to be the case, juries are particularly sympathetic to plaintiffs in medical malpractice cases.¹³⁹ The ultimate effect of this alteration of the burdens of proof, therefore, is to make medical practitioners insurers against bad results.¹⁴⁰ The Illinois courts never intended this result.¹⁴¹

135. *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill. 2d 298, 306, 312 N.E.2d 259, 263 (1974) (quoting *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill. 2d 446, 451, 207 N.E.2d 305, 308 (1965)).

136. See note 6 *supra*.

137. See Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949). Dean Prosser stated that *res ipsa loquitur* imposes "a procedural disadvantage upon the defendant which will require him to establish his freedom from negligence or to pay." *Id.* at 224. See also *Res Ipsa Loquitur: Deviation*, *supra* note 101, at 810.

138. The burden of persuasion (or risk of non-persuasion of the jury) never shifts since the rules of law are static and the parties know beforehand what they must prove in order to recover or rebut allegations of negligence. 9 WIGMORE, *supra* note 2, § 2489, at 285. See note 2 *supra*.

139. See James, *Proof of the Breach*, *supra* note 6, at 225. One study has shown that when *res ipsa loquitur* is applied in medical malpractice actions, the plaintiff wins on appeal more frequently than the average for all appellate cases. HEW, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 155 app. (1973). Under the liberal application given *res ipsa loquitur* in California, plaintiffs prevailed in 75% of all appellate cases during the period 1950-1971 in which *res ipsa loquitur* was the most significant issue. *Id.* at 142 app.

140. See *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967) (Tobriner, J., concurring). In commenting on the impact of the *Clark* decision, Justice Tobriner stated:

We should not impose the stigma of negligence upon a doctor merely because an operation yields an uncommon and inexplicable result; in the present state of the medical art, the rarity of an event may well bear no relationship to negligence. Courts which ignore that fact in formulating the law of *res ipsa loquitur* unjustly penalize physicians and plunge the legal process into an abyss of uncertainty and obfuscation.

Id. at 421, 426 P.2d at 540, 58 Cal. Rptr. at 140.

141. See, e.g., *Greenberg v. Michael Reese Hosp.*, 78 Ill. App. 3d 17, 396 N.E.2d 1088 (1st Dist. 1979). In *Greenberg*, the court stated:

In the professional negligence area, the recognition of the applicability of *res ipsa* conditioned only on a bad or unanticipated outcome to the treatment or litigation, would result in a presumption of negligence based upon result rather than any negligent act. This special class of defendants, solely because of the riskladen nature of their profession, would thus become, in effect, guarantors of result, and would have the burden of constant justification of their acts in the light of this recurring "presumption of negligence."

Id. at 24, 396 N.E.2d at 1093.

Justice Ryan, in his dissenting opinion in *Spidle*, recognized that the effect of *Spidle* would be to make physicians liable on mere proof of a rare occurrence or a bad result. 79 Ill. 2d at 24, 402 N.E.2d at 227 (Ryan, J., dissenting). In denouncing this result, Justice Ryan stated:

The *Spidle* decision also portends a severe effect on health care in Illinois. Because *Spidle* threatens to make medical practitioners insurers against bad results, the decision will have the undesirable effect of forcing the medical professional to practice "defensive" medicine.¹⁴² In turn, this may result in medical judgments being balanced against their possible legal consequences.¹⁴³ The eventual impact of the practice of "defensive" medicine will be borne by the patient who may be deprived of possibly desirable medical treatment if it is accompanied by an inherent risk of injury.¹⁴⁴ Practitioners, for example, may be hesitant to administer any such course of treatment without conducting exhaustive, and otherwise unnecessary, preliminary testing at great expense to the patient.¹⁴⁵ Further, as judgments against physicians increase, it is foreseeable that professional liability insurance premiums will increase proportionately.¹⁴⁶ The cost of these increased premiums will be ultimately paid by the patient through increased health care insurance premiums and increased costs for medical services and treatment.¹⁴⁷

To impose liability for fault, when in a vast number of cases where liability is imposed there is no fault, seems to me to be intellectually dishonest. It is demeaning to the law, to the legal profession, and to the judicial process because it will appear to the public in general, and to the members of the health care professions in particular, that the legal profession and the courts are playing games with what has come to be a meaningless Latin phrase for the purpose of permitting an injured party to recover on the basis of fault when there is in fact no fault involved.

Id. at 24, 402 N.E.2d at 227. *Accord*, *Siverson v. Weber*, 57 Cal. 2d 834, 372 P.2d 97, 22 Cal. Rptr. 337 (1962).

142. See *Siverson v. Weber*, 57 Cal. 2d 834, 839, 372 P.2d 97, 99, 22 Cal. Rptr. 337, 339 (1962), noted in, Rubsamen, *Comment: Siverson v. Weber—A Reconsideration of Res Ipsa in Medical Malpractice*, 15 STAN. L. REV. 77 (1962). See also Note, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 DUKE L.J. 939.

143. See 79 Ill. 2d at 25-26, 402 N.E.2d at 227 (Ryan, J., dissenting); *Clark v. Gibbons*, 66 Cal. 2d 399, 418, 426 P.2d 525, 538, 58 Cal. Rptr. 125, 138 (1967) (Tobriner, J., concurring). See also Rubsamen, *supra* note 21, at 282.

144. Cf. Altschule, *Bad Law, Bad Medicine*, 3 AM. J.L. & MED. 295 (1977). The author, a physician, argues that unreasonable legislative and regulatory restraints on the practice of medicine will severely affect the physician-patient relationship and will result in the prohibition of certain courses of medical treatment despite their usefulness in a therapeutic regimen. *Id.* at 297-301. See also note 143 *supra*.

145. See Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 599 (1973); Reder, *An Economic Analysis of Medical Malpractice*, 5 J. LEGAL STUD. 267, 275-76 (1976).

146. See Blaut, *The Medical Malpractice Crisis—Its Causes and Future*, 44 INS. COUNSEL J. 114, 115 (1977).

147. See Roth, *The Medical Malpractice Insurance Crisis: Its Causes, The Effects, and Proposed Solutions*, 44 INS. COUNSEL J. 469, 473-74 (1977).

One author, assessing the medical malpractice crisis, has stated:

The health care providers are not the only ones who suffer from the [medical malpractice crisis]. . . . Even those patients who are still able to obtain adequate medical and hospital care, however, are forced to suffer, because the health care providers pass on the increased insurance burdens to their patients in the form of increased charges.

M. REDISH, LEGISLATIVE RESPONSE TO THE MALPRACTICE CRISIS: CONSTITUTIONAL IMPLICATIONS 2 (1977). See generally Ehrenzweig, *Compulsory "Hospital-Accident" Insurance: A Needed First*

The Illinois court system will also suffer as a result of *Spidle*. The dockets of Illinois courts will probably experience a substantial increase in litigation based on *Spidle*'s liberalized formulation of *res ipsa loquitur*.¹⁴⁸ Plaintiffs will be less apt to agree to settlements since the obstacles they have traditionally encountered in reaching the jury have been substantially alleviated by *Spidle*.¹⁴⁹ Further, *Spidle*'s implicit recognition of conditional *res ipsa loquitur* in cases involving complex medical procedures has liberalized *res ipsa loquitur* to an extent not even recognized in California malpractice actions.¹⁵⁰ It is reasonable to assume, therefore, that Illinois courts will experience an increase in their dockets similar to the increase in the case load in California subsequent to that state's adoption of conditional *res ipsa loquitur*.¹⁵¹

CONCLUSION

Although the societal policy of compensating injured patients is laudable, when applied in a system predicated on fault its application must rest on a reasonable basis for assessing liability. To hold a physician liable for malpractice without reference to inherent risks and the probabilities of adverse

Step Toward the Displacement of Liability for "Medical Malpractice," 31 U. CHI. L. REV. 279 (1964); Morris, "Res Ipsa Loquitur"—Liability Without Fault, 25 INS. COUNSEL J. 97 (1958).

148. Illinois has already experienced a substantial increase in the number of malpractice suits filed. For example, there was a 56.7% increase in the number of malpractice suits filed in the state from 1973 to 1974. STAFF OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 1ST SESS., AN OVERVIEW OF MEDICAL MALPRACTICE 208 (Comm. Print 1975).

149. See *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967) (Tobriner, J., concurring). Justice Tobriner has opined:

Once the elusive and destructive search for an act or omission of 'malpractice' has been restricted to those cases in which a negligent cause may actually be demonstrated, a far higher percentage of all medical controversies will be settled out of court, without the "economic and emotional strain of protracted litigation requiring difficult or impossible proof."

Id. at 421, 426 P.2d at 540, 58 Cal. Rptr. at 140 (citing Ehrenzweig, *Compulsory "Hospital-Accident" Insurance: A Needed First Step Toward the Displacement of Liability For "Medical Malpractice,"* 31 U. CHI. L. REV. 279, 288 (1964)). The California State Assembly Select Committee on Medical Malpractice has acknowledged the expansion of *res ipsa loquitur*, as illustrated by the *Clark* decision, as a major factor inducing patients to sue. ASSEMBLY SELECT COMMITTEE ON MEDICAL MALPRACTICE, CALIFORNIA STATE ASSEMBLY, PRELIMINARY REPORT 21, 29-30 (1974). For an economic analysis of the factors that influence a plaintiff's decision to settle or go to trial, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.4 (2d ed. 1977).

150. See notes 106-119 and accompanying text *supra*.

151. Nationally, *res ipsa loquitur* was an issue in only 6.3% of all medical malpractice appellate decisions prior to 1950. This is compared with 13.4% of all medical malpractice cases decided from 1961 to 1971. HEW, *MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE* 129 app. (1973). *Res ipsa loquitur* was the most significant issue on appeal in 60% of all those medical malpractice cases in which it was an issue in the period from 1961 through 1971. *Id.* at 130 app. These statistics are greatly influenced by California cases since California accounted for 60% of all appellate cases involving *res ipsa loquitur* from 1961 through 1971. *Id.* at 155 app.

results involved in complex medical procedures is the product of an expedient judicial manipulation of *res ipsa loquitur* to achieve a desired result.

The *Spidle* decision appears to be an example of a well-intentioned judicial attempt to compensate a grievously injured patient. By allowing the jury to speculate on the issue of negligence without the inherent judicial safeguards embodied in the traditional formulation of *res ipsa loquitur*, however, *Spidle* seriously undermines the distinction between liability based on fault and strict liability. The practice of assessing liability based only on proof of a rare occurrence illustrates the judiciary's inability to cope with the problem of compensation for injured patients.¹⁵² Therefore, the General Assembly should give serious consideration to proposed legislation that would require the trial court to make a determination whether *res ipsa loquitur* applies upon proof that the medical result complained of would not have ordinarily occurred in the absence of the defendant's negligence.¹⁵³

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152. See 79 Ill. 2d at 25-26, 402 N.E.2d at 227 (Ryan, J., dissenting). Justice Ryan concluded his especially vigorous dissent in *Spidle* by stating:

If public policy requires that financial responsibility be placed upon the doctor for rare complications on the assumption that in that manner the risk of loss can be better spread to the public at large, I suggest that we be truthful with ourselves and with the public and not continue to attempt to do so through the largely fictitious search for fault. . . . I urge that if it is the public policy of this State that injured persons should recover for complications regardless of the fault of the doctor, then a no-fault procedure should be established to cover the unfortunate individuals who cannot recover within the traditional fault doctrine. I suggest that the fault concept be preserved for those who are truly injured through the doctor's malpractice. This will protect the doctor from being unjustly stigmatized; it will relieve him of the heavy burden of balancing medical against legal consequences, and it should enhance the prestige of the legal profession and the courts by demonstrating to the public that the judicial process is in reality and not in name only "seeking after the truth." I seriously invite the legislature of this State to give consideration to this suggestion.

Id.

153. H.B. 1029 was introduced into the 82d General Assembly on April 2, 1981 by Rep. Lee A. Daniels. The text of the proposed bill, which would amend the Civil Practice Act, ILL. REV. STAT. ch. 110, §§ 1-94 (1979), by adding § 68.5, provides:

§ 68.5. Medical malpractice—*res ipsa loquitur*. In all cases of alleged medical or dental malpractice, where the plaintiff relies upon the doctrine of *res ipsa loquitur*, the court shall determine whether that doctrine applies. In making that determination, the court shall rely upon either the common knowledge of laymen, if it determines that to be adequate, or upon expert medical testimony, that the medical result complained of would not have ordinarily occurred in the absence of negligence on the part of the defendant. Proof of an unusual, unexpected or untoward medical result, without proof that such result would not have ordinarily occurred in the absence of negligence on the part of the defendant, will not suffice for the application of the doctrine.

H.B. 1029, 82d Gen. Ass. (1981) (approved by the House of Representatives on May 2, 1981; assigned to Senate Judiciary Committee). Although Justice Ryan argued for the adoption of a no-fault compensation procedure for medical malpractice cases involving *res ipsa loquitur*, 79

Ill. 2d at 25-26, 402 N.E.2d at 227, H.B. 1029 attempts to remedy the negative impact of *Spidle* by codifying the procedural requirements for invoking *res ipsa loquitur*. The effect of H.B. 1029 is to provide trial judges with a clear standard as to when *res ipsa loquitur* should apply as a matter of law. See notes 72-86 and accompanying text *supra*. The Commission on Medical Professional Liability of the American Bar Association qualifiedly endorsed a model *res ipsa loquitur* statute that would restrict the application of the doctrine only to those cases in which a bad result was more likely than not caused by negligent conduct. ABA, 1977 REPORT OF THE COMMISSION ON MEDICAL PROFESSIONAL LIABILITY 144 app. F. The Commission opposed any statute that would restrict application to situations not specifically enumerated therein; rather, the Commission recommended the use of a statute as a guide for the courts. *Id.* Therefore, H.B. 1029 is consistent with the Commission's goal insofar as it does not codify specific situations to which *res ipsa loquitur* would be applicable; rather it serves merely as a procedural guide for trial judges.

(*Editor's Note:* After this issue went to print an amended version of H.B. 1029 was enacted, to be effective January 1, 1982. Act of September 24, 1981, P.A. 82-632, § 1, 1981 Ill. Legis. Serv. 2923 (West) (to be codified as ILL. REV. STAT. ch. 110, § 68.5)).